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6 IN THE UNITED STATES DISTRICT COURT  
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8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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10 BRUCE W. NICKERSON, individually and  
on behalf of Class of Persons similarly  
situated,

11 Plaintiffs,

12 v.

13 WELLS FARGO BANK, Chief Executive  
14 Officer JOHN G. STUMPF, MICHAEL  
HARRISON, BEN WINDLUST, NATALIE  
15 TSAI, LUCAS LAW FIRM, PAUL J. LUCAS,  
DREW KAPLIN, and Does 1 through 10,  
16 inclusive,

17 Defendants.  
18 \_\_\_\_\_/

No. C-10-01889 EDL

**ORDER CONSTRUING PLAINTIFF'S  
NOTICE OF DISMISSAL AS AN  
AMENDMENT TO COMPLAINT;  
DISMISSING PLAINTIFF'S AMENDED  
COMPLAINT WITHOUT PREJUDICE;  
AND DENYING AS MOOT  
DEFENDANTS' MOTION TO DISMISS  
AND STRIKE**

19 On April 30, 2010, Plaintiff Bruce Nickerson, individually and on behalf of Class of Persons  
20 similarly situated, filed this class action complaint against Defendants Wells Fargo Bank ("Wells  
21 Fargo") and their employees John Stumpf, Michael Harrison, Ben Windlust, and Natalie Tsai,  
22 ("Wells Fargo Employees") alleging violation of the federal Troubled Asset Relief Program  
23 ("TARP") and misuse of TARP funds. See 12 U.S.C. § 5211, et seq. Plaintiff also alleges individual  
24 and class state law claims of legal malpractice and fraud against Lucas Law Firm and their lawyers  
25 Paul Lucas and Drew Kaplin.

26 Defendants Wells Fargo and Wells Fargo Employees ("Defendants") filed a motion to  
27 dismiss and strike on July 13, 2010. Defendants Lucas Law Firm and their lawyers have not joined  
28 this motion and have not appeared in this case. On August 6, 2010, Plaintiff filed a motion for a  
continuance due to a trip out of the country. The Court granted in part and denied in part Plaintiff's

1 motion, continuing the motion to October 12, 2010, and requiring Plaintiff to file an opposition to  
 2 Defendants' motion by August 25, 2010. On August 25, 2010, Plaintiff filed a response to the  
 3 motion to dismiss and a notice of dismissal, seeking to dismiss his federal claims. On September 8,  
 4 2010, Defendants filed their reply. Because this matter was appropriate for decision without oral  
 5 argument, the Court vacated the October 12, 2010 hearing. For the following reasons, the Court  
 6 construes Plaintiff's Notice of Dismissal as an amended complaint dismissing all federal claims,  
 7 dismisses Plaintiff's amended complaint for lack of federal subject matter jurisdiction, and denies as  
 8 moot Defendants' Motion to Dismiss.

### 9 **1. DISMISSAL OF FEDERAL CLAIMS**

10 In his complaint, Plaintiff states two federal claims based on TARP. See Compl. at 15-17.  
 11 Plaintiff's first cause of action against Wells Fargo and their employees, is for violation of the TARP  
 12 act by failing "to negotiate in good faith with Plaintiff, and members of the Plaintiff Class after  
 13 receiving TARP funds." Compl. at 15-16. Plaintiff's second cause of action against Wells Fargo and  
 14 their employees, is for misuse of "taxpayer funds by hoarding TARP funds and willfully refusing to  
 15 renegotiate mortgages . . . ." Compl. at 16-17.

16 In his August 25, 2010 notice of dismissal, Plaintiff states: "Plaintiff having done further  
 17 research believes that he does not have a Federal Cause of action, and so pursuant to Rule 41(a) will  
 18 dismiss his Federal causes of action against defendant Wells Fargo only. He urges the court to  
 19 retain jurisdiction over the pendent state actions against Lucas et al." Pl.'s Not. at 1-2. However,  
 20 Rule 41(a) cannot be used to dismiss individual claims in a complaint:

21 In the specific context of Rule 41(a)(1), we have held that the Rule does not allow for  
 22 piecemeal dismissals. Instead, withdrawals of individual claims against a given  
 23 defendant are governed by Fed.R.Civ.P. 15, which addresses amendments to  
 24 pleadings. See Ethridge v. Harbor House Restaurant, 861 F.2d 1389 (9th Cir.1988).  
 25 As we noted in Ethridge, "a plaintiff may not use Rule 41(a)(1)(i) to dismiss,  
 26 unilaterally, a single claim from a multi-claim complaint." Id. at 1392. Instead, we  
 27 agreed with two of our sister circuits that "Federal Rule of Civil Procedure 15(a) is  
 28 the appropriate mechanism '[w]here a plaintiff desires to eliminate an issue, or one or  
 more but less than all of several claims, but without dismissing as to any of the  
 defendants.'" Id. (quoting 5 J. Moore et al., Moore's Federal Practice ¶ 41.06-1, at  
 41-83 to -84 (1987)) (alteration in original); see also Gen. Signal Corp. v. MCI  
Telecomms. Corp., 66 F.3d 1500, 1513 (9th Cir.1995) ("[W]e have held that Rule 15,  
 not Rule 41, governs the situation when a party dismisses some, but not all, of its  
 claims." (citing Ethridge, 861 F.2d at 1392)); Gronholz v. Sears, Roebuck & Co., 836  
 F.2d 515, 518 (Fed. Cir. 1987).

1 Hells Canyon Preservation Council v. United States Forest Serv., 403 F.3d 683, 687-88 (9th Cir.  
2 2005). Therefore, Plaintiff's dismissal of his federal claims pursuant to Rule 41(a) was ineffective.

3 However, the Court construes Plaintiff's voluntary dismissal of his federal claims as an  
4 amendment to his complaint. See Gronholz, 836 F.2d at 518 (construing plaintiff's dismissal of an  
5 individual claim as an amendment to the complaint). Amendments pursuant to Federal Rule of Civil  
6 Procedure 15(a) are liberally granted. Eldridge v. Block, 832 F.2d 1132, 1135 (9th Cir. 1987) ("Rule  
7 15's policy of favoring amendments to pleadings should be applied with extreme liberality")  
8 (internal quotations and citations omitted). Thus, Plaintiff's amended complaint states only state law  
9 claims against the Lucas Law Firm Defendants.<sup>1</sup>

## 10 **2. LACK OF FEDERAL SUBJECT MATTER JURISDICTION**

11 Plaintiff's complaint was based on federal question subject matter jurisdiction under 28  
12 U.S.C. § 1331. Because only state law claims remain in Plaintiff's amended complaint, there is no  
13 basis for supplemental jurisdiction over the remaining state law claims.<sup>2</sup> See Pintando v.  
14 Miami-Dade Housing Agency, 501 F.3d 1241, 1243 (11th Cir. 2007) ("In this case, once the  
15 amended complaint was accepted by the district court, the original complaint was superceded and  
16 there was no longer a federal claim on which the district court could exercise supplemental  
17 jurisdiction for the remaining state law claims."); Robinson v. Bank of America, NA, et al., 2010  
18 WL 1729317 (N.D. Cal. April 27, 2010) ("When a plaintiff seeking to invoke a federal forum  
19 voluntarily dismisses claims forming the basis of federal jurisdiction, the court must determine its  
20 jurisdiction based on the amended complaint. Where . . . the amended complaint fails to state any  
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22 <sup>1</sup>Even if Plaintiff intended to dismiss only some of his federal claims based on TARP, there is  
23 no private right of action against the recipients of TARP funds. See Pantoja v. Countrywide Home  
24 Loans, Inc., 640 F. Supp. 2d 1177, 1185 (N.D. Cal. July 9, 2009) (finding no express or implied private  
25 right of action against TARP fund recipients, and holding that: "Plaintiff's claims may not be based on  
the theory that Defendants violated the intent and purpose of TARP"). Thus, even if Plaintiff's  
dismissal is construed as retaining TARP claims against the individual Wells Fargo Defendants,  
amending of the complaint to retain those claims would be futile.

26 <sup>2</sup> In Plaintiff's response to Defendants Wells Fargo and Wells Fargo Employees' motion to  
27 dismiss, Plaintiff asserts that he "perhaps should have included as a cause of action a state claim under  
28 [Cal. Civ. Code] C.C.P. § 2923.5 or 2923.6. Plaintiff would urge this court to permit him to amend this  
complaint to add this state action and pray this court to exercise its pendent jurisdiction." Pl.'s Res. at  
1-2. Even if Plaintiff included these state law claims, this would not provide a basis for federal question  
jurisdiction.

basis for federal jurisdiction, the court must dismiss the case.”) (citing Schwarzer et al., Federal Civil Procedure Before Trial, § 2:91.5 (Rutter Group); Wellness Community-National v. Wellness Community, 70 F.3d 46, 49 (7th Cir. 1995)). Therefore, the Court dismisses Plaintiff’s amended complaint without prejudice. Defendants’ motion to dismiss is denied as moot.

**IT IS SO ORDERED.**

Dated: October 12, 2010

*Elizabeth D. Laporte*

ELIZABETH D. LAPORTE  
United States Magistrate Judge